IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TODD D. and ELISABETH FLETCHER, Appellants, v. CLARK MCGOWAN, ET AL, Respondents.	No. 32708-2-II UNPUBLISHED OPINION

PENOYAR, J. — Todd and Elisabeth Fletcher appeal an unfavorable bench trial verdict in their suit against Clark McGowan (McGowan), the developer who sold them undeveloped real property. At trial, the Fletchers claimed breach of contract, fraud, breach of warranty, and violation of the Consumer Protection Act, contending that the real property contained undisclosed defects that diminished the property's value. The trial court found that the Fletchers had sufficient notice of the problematic conditions on the real property and that they paid the property's fair marked value. We affirm.

FACTS

I. Background

The Fletchers were interested in purchasing an undeveloped lot in Puyallup. They initially met with Ryan McGowan (Ryan)[1], the lot owner's agent.

Ryan gave the Fletchers a map of the property with the wetland portions highlighted in color. Flags on the property also marked the wetland and the buffer areas. Ryan explained that the Fletchers could not build or pave on the wetlands. He did not tell them that they were restricted from entering or otherwise disturbing the wetlands.

McGowan briefly met with the Fletchers while they looked at the property. McGowan is an experienced professional real estate developer and owner of Trinity Land Company. McGowan had transferred the lot in question to 84th Street Associates, a limited liability company (LLC) that he owned and managed.

During his brief meeting with the Fletchers, McGowan told them he would be spending about $13,000 on plants. The Fletchers thought this meant free landscaping and a place where their children could play.

A few weeks later, on February 3, 1997, Todd Fletcher met with Ryan and McGowan at the Trinity Land Company's offices. Ryan explained that a septic plan had been approved for the property. McGowan prepared a Real Estate Purchase and Sale Agreement (Sale Agreement) that he and Todd Fletcher signed. Todd then took the Sale Agreement home for Elisabeth Fletcher to sign. Attached to the Sale Agreement was a preliminary short plat showing the wetlands but not showing any easements or other restrictions.

The Sale Agreement listed a $62,500 purchase price, which was McGowan's asking price for the property. Paragraph one of the Sale Agreement says, "Purchase price to include approved

[1] We are using the first name for clarification purposes. No disrespect is intended.

Septic Design System." Exhibit (Ex.) 3. The Sale Agreement also recited that the "[t]itle is to be free of all encumbrances." Ex. 3. Paragraph three made the sale's closing contingent on the final short plat's approval and recording. According to paragraph six, the seller was required to furnish title insurance. Finally, paragraph 17 contained an attorney fees clause.[2]

On July 8, a few weeks prior to the sale's closing, McGowan recorded a wetland mitigation plan with the county auditor. This plan required planting, grading, fencing, maintenance, and monitoring to preserve the wetlands on the lot the Fletchers were about to purchase. The estimated cost to implement the plan was $16,880. McGowan posted a bond with the county to cover the work, which he was to complete in three years. McGowan never informed the Fletchers about the plan and never sent them a copy.

On July 16, McGowan recorded the final short plat. Unlike the preliminary plat attached to the Sale Agreement, this one showed an easement for drainage next to the wetland buffer area. The development engineering notes for the plat required the Fletcher's lot and the neighbor's lot to share a driveway. The plat also required the septic drainfield to be on the neighboring lot. McGowan did not send the Fletchers a copy of the final short plat or specifically inform them about these changes from the preliminary plat.

On July 28, McGowan recorded a septic agreement (separate from the septic design system) that he had entered into with the Pierce County Health Department on July 16, 1997.

[2] "If either party hereto is required to retain an attorney to bring suit or seek arbitration to enforce any provision of this agreement, said party shall be entitled to reasonable attorneys' fees." Ex. 3.

This agreement bound the land owner and "his heirs, assigns, and successors in interest" to maintain the septic system. Ex. 10. McGowan testified that this agreement for monitoring the septic system was part of the requirement for approval. He never discussed the septic system with the Fletchers.

The parties finally closed the sale on July 30. The Fletchers did not receive a copy of the closing documents before they went to the title company to sign. During the signing, they looked over some of the papers in the stack they were presented but did not read everything. The deed was recorded on August 6.

The Fletchers began to build their new home on the lot about a year and a half later. They learned that the septic system would cost about $13,000 to install because it required a special biofilter system and it had to pump waste to a drainfield 400 yards away on the neighbor's property. Typical septic systems cost about $3,500 to install.

McGowan did not do the work the wetland mitigation plan required. In July 2000, McGowan received a letter from Pierce County, copied to the Fletchers, reminding him of his obligation. The Fletchers, who did not know about the plan before receiving the letter, were concerned about McGowan bringing heavy equipment onto their property via their driveway and otherwise disturbing their living space.

The Fletchers denied McGowan access to their property and eventually McGowan forfeited his bond to the county. The Fletchers then began negotiating with the county regarding how to implement the plan. The Fletchers do not claim any damages based on McGowan's nonperformance of the plan. Around this time, the Fletchers also became aware of the extent of the wetland restrictions.

II. Procedural history

On July 29, 2003, the Fletchers filed suit against McGowan, alleging breach of warranties of title, failure to disclose substantial defects that diminished the property's value, fraud, breach of contract, and violation of the Consumer Protection Act (CPA). At the bench trial, the Fletchers' expert, Clifford Gendreau, testified that the non-wetland portion of the property standing alone, with the easement and shared driveway taken into consideration, would have cost $42,500 during the summer of 1997.

Harry Malesis, the appraiser for the bank that issued the Fletchers' original purchase loan, testified as an expert for McGowan. He reaffirmed his original conclusion that $62,500 was the land's fair market value (FMV) in 1997. He testified that the cost to install a septic system is usually not considered in the FMV because an appraiser does not know what kind of system is required. He also said that easements do not necessarily affect a property's value because easements are common.

On cross examination, the Fletchers demonstrated that Malesis was licensed as a residential real estate appraiser, meaning he could perform appraisals on residential property of one to four units. They distinguished this from a general real estate appraiser, who is qualified to appraise any real estate. They suggested that a residential real estate appraiser is not qualified to appraise raw land but they did not specifically object to Malesis's testimony.

The trial court found for McGowan. In its oral ruling, the trial court found that McGowan was not required to give the Fletchers copies of the recorded documents and that the

title company had prepared a title report for the Fletchers. It found that the Fletchers had an obligation to investigate because they had knowledge of the wetlands, the septic situation, and the short plat issues. Because there was no breach of contract, the trial court did not reach the CPA or damages issues.

At the same time it entered the final orders, the trial court granted McGowan's motion to amend his answer to include a request for attorney fees. Based on McGowan's request, the trial court awarded him $23,992.50 in attorney fees and $726.25 in costs.

ANALYSIS

I. Cost of the septic system

The Fletchers claim that the lot's purchase price included a septic system. They point to the clause in the Sale Agreement saying, "Purchase price to include approved Septic Design System." Ex. 3. They claim that they are entitled to the system's purchase price and the trial court erred in determining the Sale Agreement was silent as to who would pay for the installation.

McGowan correctly argues that the Fletchers make this claim for the first time on appeal. The Fletchers' complaint did not allege that McGowan breached this provision of the Sale Agreement. At trial, the Fletchers testified that the septic system cost much more than they anticipated, implying that McGowan should have informed them about the increased costs. They did not say that McGowan promised to install their septic system.

Because the Fletchers did not raise this issue below the trial court did not make a contract interpretation ruling that we can review. We therefore deny the claim for the septic system installation because the Fletchers raise it for the first time on appeal. RAP 2.5(a); *American Agency Life Ins. v. Russell*, 37 Wn. App. 110, 116, 678 P.2d 1303 (1984).

II. Damages suffered due to title defects

The Fletchers claim that the trial court erred in not finding that the property was of diminished value because of undisclosed title defects. They claim they are entitled to the difference between the property's value as represented to them (the $62,500 they paid) and the property value of the usable portion, which they say was $42,500.

The trial court's findings of fact concluded: "There was no evidence that the purchase price paid by the Plaintiffs of $62,500 for this lot was not the fair market price for the lot." Clerk's Paper (CP) at 69. We review whether substantial evidence supports this finding of fact. *Nordstrom Credit, Inc. v. Dep't of Revenue*, 120 Wn.2d 935, 939, 845 P.2d 1331 (1993). Evidence is substantial when it is sufficient to persuade a rational fair-minded person the finding is true. *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

Credibility determinations are for the trier of fact and are not subject to review. *State v. Lubers*, 81 Wn. App. 614, 619, 915 P.2d 1157 (1996) (citing *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)). We defer to the trier of fact, who resolves conflicting testimony, evaluates the witnesses' credibility, and generally weighs the evidence's persuasiveness. *Lubers*, 81 Wn. App. at 619.

Here, the trial court had testimony from Malesis, the appraiser who appraised the property for the bank that issued the Fletchers' initial purchase loan. He testified that $62,500 was the property's FMV, even with the wetlands, the easements, and the other restrictions. The trial court also heard contrary testimony from Gendreau, the Fletchers' expert. However, Gendreau did not testify about the value of the entire lot. Rather, he valued only the property's

non-wetland section, the part that the Fletchers called the "usable portion." 1 Report of Proceedings (RP) (08/16/04) at 117. The court as the trier of fact had the duty to weigh the conflicting testimony. We will not disturb on appeal the trier of fact's determination that Malesis's testimony deserved greater weight. *Lubers*, 81 Wn. App. at 619.

We apply this rule even in light of the Fletchers' evidence that Malesis was not licensed to appraise raw land. This type of evidence affects only the testimony's weight. The trial court apparently found that Malesis's testimony was more persuasive despite the challenge to his credentials. We therefore hold that substantial evidence supports the trial court's conclusion that the Fletchers paid a fair price for the land.

III. Attorney fees

The Fletchers claim the trial court erred in allowing McGowan to amend his answer retroactively under Civil Rule (CR) 15(b)[3] to include a claim for attorney fees. They claim the attorney fee issue never arose during trial or in the pleadings. They also claim that this is not an action to enforce the Sale Agreement, so the contract's attorney fees provision does not apply.

[3] CR 15(b) says:

> When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

McGowan claims that the parties acknowledged in both the pretrial correspondence and in the arguments at trial that the prevailing party was entitled to attorney fees. He points out that the Sale Agreement formed the basis of the Fletchers' claims and that the Fletchers argued during closing that they were entitled to attorney fees under the Sale Agreement. He also argues that the right to attorney fees cannot be waived when it is part of a contract. Therefore, he claims the trial court did not err in allowing him to amend the pleadings.

A. CR 15(b)

CR 15(b) allows a party to amend pleadings to conform to the evidence presented at trial. *See Hubbard v. Scroggin*, 68 Wn. App. 883, 889, 846 P.2d 580 (1993). The rule expressly allows amendment even after judgment. CR 15(b). Amending a pleading under CR 15(b) must meet certain requirements of consent, notice, and no prejudice. *Hubbard*, 68 Wn. App. at 889. Courts construe CR 15(b) liberally. *Burlingham-Meeker Co. v. Thomas*, 58 Wn.2d 79, 81, 360 P.2d 1033 (1961). We will reverse a trial court's ruling on a CR 15 motion only on a showing of manifest abuse of discretion. *Hubbard*, 68 Wn. App. at 889.

In this case, McGowan first asked for statutory attorney fees in his answer. His attorney reminded the Fletchers' attorney in pretrial correspondence that McGowan wanted attorney fees if he prevailed. Finally, McGowan argued at trial in both opening and closing that he should be entitled to attorney fees if he prevailed. Therefore, the Fletchers had notice of this claim.

The Fletchers did not object at trial when McGowan asked for attorney fees nor did they argue in rebuttal closing that McGowan was not entitled to attorney fees if he prevailed. They do not claim that they would have acted differently had McGowan initially asked for attorney fees under contract as well as under the statute.

B. Action to Enforce a Contract

The Fletchers' claim that this is not an action to enforce the Sale Agreement fails. They specifically referred to the Sale Agreement in their complaint and attached a copy as exhibit A. Their complaint alleged a breach of contract and cited the "Condition of Title" provision of the Sale Agreement. CP at 4. At trial, they entered the contract into evidence and referred to it during their arguments, even citing the attorney fee provision. Because this is an action on a contract with an attorney fee provision, McGowan is entitled to attorney fees even though he is not the party that brought suit. RCW 4.84.330.[4]

Therefore, the trial court did not abuse its discretion in awarding McGowan his attorney fees.

IV. Consumer Protection Act

The Fletchers claim that the trial court erred in failing to find that McGowan violated the CPA.

[4] RCW 4.84.330 says:

> In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.
>
> Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any provision in any such contract or lease which provides for a waiver of attorney's fees is void.
>
> As used in this section "prevailing party" means the party in whose favor final judgment is rendered.

Whether an act or practice is actionable under the CPA is a question of law. *State Farm Fire & Cas. Co. v. Huynh*, 92 Wn. App. 454, 458, 962 P.2d 854 (1998). We review this issue de novo. *State Farm*, 92 Wn. App. at 458 (citing *State v. McCormack*, 117 Wn.2d 141, 143, 812 P.2d 483 (1991).

A plaintiff must prove five elements in order to prevail in a private CPA action: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, and (4) causing (5) injury to the plaintiff in his or her business or property. *Anderson v. Valley Quality Homes*, 84 Wn. App. 511, 515, 928 P.2d 1143 (1997) (citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 786-87, 719 P.2d 531 (1986)).

In this case, the Fletchers have failed to show the fifth element, injury. As we explain in section one, the Fletchers failed to show they are entitled to damages for the septic system cost. In section two, we determined that the evidence supported the trial court's finding that the Fletchers paid the property's FMV. Because they cannot show any damages resulting from the transaction, their CPA claim fails.

V. Identity of the proper defendants

The Fletchers claim the trial court erred in entering final orders that do not distinguish between McGowan's actions as an individual versus the LLC's actions. However, the Fletchers acknowledge that this is significant only if we reverse and grant them judgment. Because the Fletchers did not show error on appeal, we need not determine whether McGowan was personally liable.

VI. Attorney fees and costs on appeal

Both the Fletchers and McGowan request attorney fees on appeal. McGowan specifically

claims attorney fees under the Sale Agreement.

We hold that McGowan is entitled to attorney fees on appeal pursuant to the Sale Agreement. As we explained above, the Sale Agreement is central to this dispute despite the Fletchers' claims to the contrary. Therefore, McGowan is entitled to his attorney fees upon compliance with RAP 18.1(a).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

PENOYAR, J.

We concur:

BRIDGEWATER, J.

HUNT, J.